

REMARKS

In view of the following remarks, it is respectfully requested that all pending claims, namely claims 1-7, 9, 11, 13-16, 18, 19, 29-35, 37-40, 42, 43, and 53, be allowed. A claim listing has been included, although there are no amendments to the claims with this paper. However, the specification has been amended to correct a typographical error.

Claims 1-7, 9, 11, 13-16, 18, 19, 29-35, 37-40, 42, 43, and 53 were rejected under 35 U.S.C. §103(a) as being unpatentable over Ando et al. (U.S. Patent No. 5,422,483) in view of Utzinger et al. (U.S. Patent No. 6,571,118). However, the Examiner states that not all of the elements of the current invention are present in the cited prior art. Specifically, neither prior art citation describes a system in which an encoder is used. The Examiner states that this element of the current invention is obvious because it is "notoriously old and well-known to use optical encoding units to encode selected frequencies of light passing through optical filters, and it is submitted that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the invention of Ando et al. such that it further comprise such an optical encoding unit."

Applicants respectfully assert that there is no evidence that adding an encoder in the manner claimed in the current invention is "notoriously old and well-known" in the art. The patents that the Examiner cites (Ando et al. and Utzinger et al.) do not disclose the use of an encoder. This lack of disclosure in either of the cited references indicates that the use of an encoder in a spectroscope is not notorious or well-known in the art.

Further, it is not "appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known. For example, assertions of technical facts in the areas of esoteric technology ... must always be supported by citation to some reference work recognized as standard in the pertinent art." M.P.E.P. § 2144.03. In addition, courts have rejected "the notion that judicial or administrative notice may be taken of the state of the art. The facts constituting the state of the art are normally subject to the possibility of rational disagreement among reasonable men and are not amenable to taking of such notice." See M.P.E.P. § 2144.03, citing *In re Eynde*, 480 F.2d 1364, 1370 (CCPA 1973). Applicants respectfully assert that the current invention is in an area of esoteric technology. Thus, the Examiner's assertion that it is notoriously old and well known to use an encoder in the manner

claimed in the current invention must be supported by documentary evidence. As mentioned above, courts have rejected the notion that administrative notice can be taken of the state of the art, and stating that the use of an encoder is notoriously old and well known is taking just such an action.

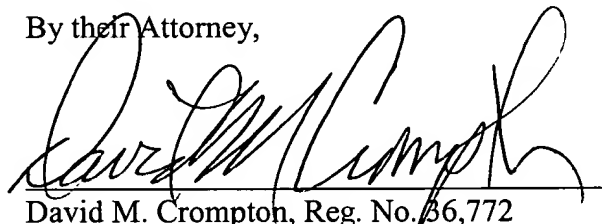
In summary, Applicants respectfully assert that it is not notoriously old and well known to use an encoder in the manner in which the current invention uses an encoder. Because this element of independent claims 1, 29, 53, 54 and 58 has not been shown to be notoriously old and well known and it is not present in either of the cited references, all elements of the current invention are not present in the cited prior art. Thus, the independent claims of the current invention are not anticipated. Dependent claims 2-7, 9, 11, 13-16, 18, 19, 30-35, 37-40, 42, and 43 are, therefore, also in condition for allowance.

Reexamination and reconsideration are respectfully requested. It is respectfully submitted that all pending claims are now in condition for allowance. Issuance of a Notice of Allowance in due course is requested. If a telephone conference might be of assistance, please contact the undersigned attorney at (612) 677-9050.

Respectfully submitted,

Robert K. Rowe et al.

By their Attorney,



David M. Crompton, Reg. No. 36,772
CROMPTON, SEAGER & TUFTE, LLC
1221 Nicollet Avenue, Suite 800
Minneapolis, MN 55403-2420
Telephone: (612) 677-9050
Facsimile: (612) 359-9349

Date: _____

10/08/03